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# PRACTICE OF GENOCIDE PUNISHMENT AND PREVENTION: STRENGTHS AND WEAKNESSES OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA IN COMPARISON TO THE INTERNATIONAL COURT OF JUSTICE

**Abstract:** Recent sentence of war-time leader Radovan Karadžić brought a new argument to the discussion of effectiveness of transitional justice in general and International Criminal Tribunal for the Former Yugoslavia particularly. Being sentenced to 40 years of imprisonment, Karadžić, however, acquitted one count of indictment – genocide in municipalities. This, along with the lowered number of victims of Srebrenica, became a reason of wide disappointed of the survivors and invoked another legal dispute as to whether the achievements of the international courts punishing and preventing genocide outnumber the failures.

**Keywords:** *ICJ, ICTY, genocide, state responsibility, individual criminal responsibility, accountability, transitional justice*

## Introduction

Ten years after its establishment, International Criminal Tribunal for the former Yugoslavia ('ICTY' or 'the Tribunal')[2] announced its completion strategy,[3] which indicates the finishing point of the Tribunal's work. Completion means also that it is time to evaluate the work of the ICTY in terms of its effectiveness, especially within the framework of punishment and prevention of the crime of genocide, because it is known as the 'crime of crimes'.[4] The most recent ICTY finding confirms that "at least 5,115 Bosnian Muslim males were killed by Bosnian Serb Forces",[5] although the Prosecution experts validated a number of at least 7,475 victims.[6]

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[2)] Established by UNSC Resolution (25 May 1993) UN Doc S/RES/827 (1993).

[3)] UNSC Resolution 1503 (28 August 2003) UN Doc S/RES/1503 (2003).

[4)] Prosecutor v. Jean Kambanda (Judgment and Sentence) [1998] ICTR-97-23-S (4 September 1998), para. 16; Prosecutor v. Omar Serushago (Sentence), [1999] ICTR-98-39-S (5 February 1999), para. 15.

[5)] Prosecutor v. Radovan Karadžić (Trial Judgement) [2016] IT-95-5/18-T (24 March 2016), para.5660.

[6)] Brunborg, H. and Urdal, H., 200. Report on the Number of Missing and Dead from Srebrenica, 12 February 2000.

On the other level, genocide is a violation of the Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention'),[7] therefore, may also constitute a case before the International Court of Justice ('ICJ' or 'the Court').[8]

Still, cases of both the ICJ and the ICTY demonstrate the achievements and failures of international justice in terms of genocide punishment and prevention. By its legal nature, the ICJ and the ICTY play different roles in the development of the concept of genocide punishment,[9] since the former addresses the issue of state responsibility[10] and the latter has jurisdiction to establish individual criminal responsibility.[11] Hence, the jurisdictions of the two institutions are not overlapping except when both have to decide, for instance, a question whether genocide has been committed in a certain state.

Nevertheless, in the absence of *stare decisis* principle[12] prior decisions of the ICTY are not binding for the Tribunal itself. Consequently, the same fact reflected in different cases may invoke opposite legal findings, which might question fairness and impartiality of the Tribunal. On the other hand, the ICJ is not obliged to rely on the ICTY's decisions, although it occasionally does so,[13] which rises concerns in the academic environment whether or not such selectiveness reflects negatively on the ICJ judgements.[14] In the main, deficiency of hierarchical system of international justice, particularly, in correlation between the ICJ and the ICTY[15] builds a basis for contradicting decisions that both may be final in the light of the position of each institution as a last resort instance.[16]

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7) Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 1021 UNTS 280.

8) Established by the U.N. Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 3.

9) Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), (Separated Opinion of Judge Tomka), [2007], ICJ Reports 2007, p. 312, para. 73.

10) Art. 34 (1) ICJ Statute.

11) Art. 1 ICTY Statute as amended by UNSC Resolution (7 July 1999) UN Doc S/RES/1877 (2009).

12) Prosecutor v. Zejnil Delalić, Zdravko Mucić, also known as "Pavo", Azim Delić, Esad Landžo, also known as "Ženga" (Musić et al.) (Decision On the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference) [1997] IT-96-21 (28 May 1997) para. 16: "Prior decisions of a Trial Chamber in another case have no binding force per se in the case before us."

13) Bosnia and Herzegovina v Serbia and Montenegro, p. 134, para. 223

14) SáCouto, S., 2007. Reflections on the Judgment of the International Court of Justice in Bosnia's Genocide Case against Serbia and Montenegro. Human Rights Brief, 15(1), p. 5.

15) Musić et al. (Appeal Judgment) [2001] IT-96-21-A (21 February 2001), para. 24.

16) Bosnia and Herzegovina v Serbia and Montenegro (Declaration of Judge Skotnikov), [2007],

Therefore, it appears to be attention-grabbing to compare the contribution of the ICJ and the ICTY into the mechanism of punishment and prevention of genocide, although these institutions elaborate on different instruments of international justice.

**Genocide punishment: key achievements and failures**

Punishment of the crime of genocide is a key factor in bringing justice in response to mass violence and grave breaches of the international law norms.

In general, a significant amount of cases before the ICTY became new landmarks of international criminal law. Particularly, the Tribunal found Radislav Krstić Ljubiša Beara, Vujadin Popović, Drago Nikolić, Zdravko Tolimir, and Radovan Karadžić guilty of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide or complicity in genocide. The milestone case of the ICJ practice within the same context was *the Genocide case* (Bosnia v Serbia), in which the discussion regarding the violations of the Genocide Convention has its strong and weak points.

Yet the most important issues highlighted by each institution are the perpetrator's responsibility for the violation of the international prohibition of genocide and the discussion of the elements of the crime as such, which is argued below.

In order to evaluate the success of the ICJ and the ICTY in punishing genocide the achievement of the main goals of such punishment must be assessed. These goals include suspension of current violations and restriction from further ones, reconstruction of public order, adjustment of social behaviour and rehabilitation of victims of the committed crimes and post-traumatized society as such.[17]

As to the latter purpose, despite certain challenges and weaknesses, the Tribunal so far confirms the ability to handle its tasks to end impunity and to bring justice to victims. Although researchers claim the ICTY's non-fulfilment of the goal to promote reconciliation in the region,[18] free of combat activities status of the states of former Yugoslavia prove the position of lawyers such as K.Askin[19] and P.Akhavan[20] who admit general positive impact of the Tribunal's practice.

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ICJ Reports 2007, p. 375.

17) Reisman, W., 1996. Legal Responses to Genocide and Other Massive Violations of Human Rights. Law and Contemporary Problems, 59(4), pp. 75-76.

18) Allcock, J., 2012. The International Criminal Tribunal for the Former Yugoslavia. In: C. Ingrao and T. Emmert, ed., Confronting the Yugoslav Controversies: A Scholars' Initiative, 2nd ed. West Lafayette, Indiana: Purdue University Press, p. 380.

19) Askin, K., 2003. Reflections on Some of the Most Significant Achievements of the ICTY. New England Law Review, 37, V.4 (2002-2003), pp. 904-905.

20) Akhavan, P., 2001. Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?, The American Journal of International Law, 95(1), p. 919.

Regarding the former objective, the ICTY became the first justice initiative after Nuremberg and Tokyo Tribunals to prosecute grave breaches of international law that did influence later transitional justice in Rwanda, Sierra Leone, and Cambodia. On the other hand, confirmation of state responsibility fulfils general aims of punishment because it highlights the seriousness of the crime of genocide and is capable of stopping violation of respective norms of the international law in future. Furthermore, it reassures justice and prevents the repetition of crime by simply reforming legal personality of a state.[21]

From this perspective, the ICJ Genocide Judgment is a good example of the punishment of a state for non-compliance with obligations under international law. Following the ICTY's standard in the *Krstić and Blagojević cases*,[22] which also distinguishes the Genocide Judgement from the majority of cases where the ICJ does not rely on jurisprudence of other international courts,[23] the ICJ confirmed the Srebrenica massacre being genocide as Serbia failed to prevent and punish it being a state that "failed to comply … with its obligation to prevent and its obligation to punish genocide deriving from the Convention, and that its international responsibility is thereby engaged."[24] Additionally, the ICJ found Serbia's violation of the obligation to cooperate with the ICTY in rejection to transfer Ratko Mladić to the Tribunal.[25]

Moreover, recognition of the possibility for state *per se* to be responsible for genocide was indeed one of the main attainments of the ICJ considering practical and legal difficulties raised by the attempt to acknowledge state responsibility as of corporate entity in the light of the art. 4 of the Genocide Convention, which does not explicitly mention states among the obligation holders.[26] However, art. 1 of the Convention contains two provisions relevant for concluding on the implicit prohibition. First, the Contracting Parties agreed to accept an international character of the crime of genocide; second, they took an obligation "to prevent and to punish."[27] Bearing in mind that genocide is criminally punishable when committed by individuals; the Court applied

21) Lang, A., 2011. Punishing Genocide: A Critical Reading of the International Court of Justice. In: T. Isaaks and R. Vernon, ed., Accountability for Collective Wrongoing, 1st ed. New York: Cambridge University Press, pp. 110-112.

22) Prosecutor v. Radislav Krstić (Judgment) [2001] IT 98-33-T (2 August 2001), para. 560, Prosecutor v. Radislav Krstić (Appeal Judgment) [2004] IT 98-33-A (19 April 2004), para. 23; Prosecutor v. Vigoje Blagojević and Dragan Jokić (Trial Judgment) [2005] IT-02-60 (17 January 2005); Bosnia and Herzegovina v Serbia and Montenegro, para. 278: The ICJ relied on the Krstić Judgment's summary of the facts.

23) Bosnia and Herzegovina v Serbia and Montenegro, para. 212.

24) Bosnia and Herzegovina v Serbia and Montenegro, para. 450.

25) Bosnia and Herzegovina v Serbia and Montenegro, para. 471.

26) Art. 4 of the Genocide Convention.

27) Art. 1 of the Genocide Convention.

the Articles on State Responsibility approach of attributing conduct of private individuals to a state. [28]

Although the ICJ acknowledged only Serbia's non-compliance with obligations to prevent and to punish genocide in Srebrenica, but not the commitment of genocide, the concept of state responsibility developed in the Genocide case has a major influence on further cases and legal theory. However, the ICJ used the "effective control" test from *Nicaragua case*[29] in order to examine the role of Serbia in committing genocide and to come to a reasonable conclusion on state liability. On the contrary, the ICTY used a lower standard of "overall control" deciding on the responsibility for "aiding and assisting" in the *Tadić case*.[30] The ICJ addressed such an incoherence of the doctrine to the different nature of decided cases emphasizing attention of the ICTY that in *Tadić* focused more on the existence of armed conflict. The "overall control" test is not appropriate, however, as "it stretches too far, almost to the breaking point, the connection which has to exist between the conduct of a State's organs and its international responsibility."[31]

Discussing possible failures, a question remains in an aspect of the recognition of genocide occurred in other areas than Srebrenica. While the ICJ explicitly rejected the existence of the crime outside Srebrenica,[32] the ICTY analysed it under a count of genocide in municipalities, but did not find any accused guilty of it "beyond all reasonable doubt."[33] Particularly, Karadžić trial Chamber found that the Bosnian Muslims and the Bosnian Croats were protected groups within the meaning of the definition of genocide and members of these groups were killed or subjected to serious bodily or mental harm, but it did not find any genocidal intent.[34] Evidently, this did not lead to an absolute impunity of perpetrators, but invoked another dispute concerning the extent of genocidal intent and the difference between genocide and ethnic cleansing.

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[28] Bosnia and Herzegovina v Serbia and Montenegro, para. 166. Articles of the Responsibility of States for Internationally Wrongful Acts (ILC) adopted by UNGA Resolution No.56 UN Doc. A/RES/56/83 [2001], although the documents issued by U.N. General Assembly are not legally binding.

[29] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), (Merits, Judgment) [1986] ICJ Reports, p.14, paras. 64, 65.

[30] Prosecutor v Duško Tadic (Appeal Judgment) [1999] IT-94-1-A (15 July 1999), para. 145.

[31] Prosecutor v Duško Tadic, para. 406.

[32] Bosnia and Herzegovina v Serbia and Montenegro, paras. 87–134.

[33] Prosecutor v. Momčilo Krajišnik (Judgement) [2006] IT-00-39-T (27 September 2006), para. 392.

[34] Prosecutor v. Radovan Karadžić (Trial Judgement) [2016] IT-95-5/18-T (24 March 2016), paras. 2574, 2579, 2582 and 2626.

Both the ICJ[35] and the ICTY[36] emphasized the distinction between genocide and ethnic cleansing based on the failure to demonstrate required in international criminal law intent.[37] Hence, the ICTY convicted Krstič of genocide conducted through forcible displacement of the members of a group, which might constitute an element of both genocide and ethnic cleansing depending on finding a genocidal intent.[38] Noticeably such distinction contributes to inconsistency rather than to incoherence it seems reasonable to adopt a similar standard for further use in analogous cases.

Considering the ICJ's intent not to find *dolus specialis* in large part of application seems to be more political than legal pro-Serbian decision since Serbia was permitted to submit redacted documents.[39] At that moment correspondence between the ICJ and the ICTY practices turned into a negative effect narrowing the pattern for the establishing of state responsibility for genocide.[40]

However, a matter of genocidal intent is so complex and sensitive that international justice faces difficulties to prove it in many cases. Hence, in *Brđanin*, the ICTY declined to hold the accused, a leading political figure among the Bosnian Serbs in the Bosnian Krajina region, criminally responsible for the crime of genocide because he lacked genocidal intent.[41]

Furthermore, issues of political partiality, procedural weaknesses and organizational problems remain to be arguable, as well as the *Milošević case*,[42] which barely could be considered as a failure, but as a procedural mistake of the Tribunal.

**Prevention of the crime of genocide: have the ICJ and the ICTY been successful?**

In post-conflict societies, prevention of further atrocities plays an important role, especially considering the multiethnic nature of the former Yugoslavia that adds a reason to assume the possibility of the repetition of genocide. However, in Bosnia and Herzegovina and in Croatia the indictments issued

35) Bosnia and Herzegovina v Serbia and Montenegro, para. 71.

36) Prosecutor v. Vigoje Blagojević and Dragan Jokić (Judgment) [2007] IT-02-60-A (9 May 2007), para.123.

37) Art. 2 of the Genocide Convention, art. 4 of the ICTY Statute.

38) Prosecutor v. Radislav Krstić (Judgment) [2001] IT 98-33-T (2 August 2001), para. 594.

39) Bosnia and Herzegovina v Serbia and Montenegro, para. 209

40) Bosnia and Herzegovina v Serbia and Montenegro (Dissenting Opinion of Vice-President Al-Khasawneh) [2007] ICJ Reports 2007, pp. 215, 217, paras. 33-38

41) Prosecutor v. Radoslav Brđanin (Judgment) [2004] IT 99-36-T (1 September 2004), para. 989.

42) Prosecutor v. Slobodan Milošević (Order Terminating the Proceedings) [2006] IT-02-54-T (14 March 2006).

by the ICTY allowed a peaceful development of democracy, strengthening the position of liberal forces instead of the extremist wing. Particularly, in Bosnia and Herzegovina ending impunity contributed to non-violent multiethnic coexistence; deportation and abuse of ethnic minorities were prevented in Kosovo; the work of the ICTY also played a role in Croatia's process of international integration.[43]

On the example of the former Yugoslavia it remains to be clearly understandable that punishment of wrongful behaviour can target leaders who actually contemplate or are engaged in the realization of criminal policies and against other leaders who might be tempted absent a credible threat of punishment. In both scenarios, the threat of punishment may persuade potential perpetrators to adjust their behaviour. In this regard, acquittal of the Serb radical leader Vojislav Šešelj could be considered as an obvious failure of international justice to punish crimes committed on a high political level.[44] However, Seselj was never accused of genocide-related crimes.[45]

Still, on the international level, the success of the ICJ and the ICTY in terms of fulfilment of prevention function could be measured by the fact that after the first indictment issued by the ICTY history does not know cases where genocide occurred.[46] Moreover, the ICJ Genocide Judgment remains a fundamental basis for the prevention of genocide since as it was mentioned above the Judgment indeed has enforced the obligation to prevent genocide under the Genocide Convention.[47]

Practice of the Tribunal was taken into consideration at the time of adoption of the ICC's Rome Statute, which generally to holding world-famous criminals accountable. This legacy of international justice assisted in democratization of domestic justice and its improvement to compliance with due process standards, enabled the internalization of accountability in the political views and reinforced inhibitions against ideologies based on ethnic hatred and violence.

In the end, as it is stated by the ICJ, "one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who

43) SáCouto, S, 2007. Reflections on the Judgment of the International Court of Justice in Bosnia's Genocide Case against Serbia and Montenegro. Human Rights Brief, 15(1), p. 9.

44) Le Procureur c. Vojislav Šešelj (Jugement) [2016] IT-03-67-T (31 mars 2016).

45) Prosecutor v. Vojislav Šešelj (Third Amended Indictment) [2007] IT-03-67-T (7 December 2007).

46) Rwandan genocide happened earlier the same year and other cases such as Darfur are not recognized by respective authorities such as the U.N. or the ICC.

47) Bosnia and Herzegovina v Serbia and Montenegro.

commit the acts one is trying to prevent",[48] and evaluation of court practice of genocide punishment has been done above.

Although the importance of transitional justice and ended impunity is hard to underestimate, there are other essential elements of the mechanism of genocide prevention that are not necessarily limited to judicial measures while being effective. Human rights education with promotion of respect for dignity of every human being regardless of race, skin colour etc., teaching oral history with testimonies of past genocide occurrences, and commemoration of victims could be listed as such measures. Even in this context, the ICJ and the ICTY have indirect impact through legal education and fact-finding.

The same indirect impact may be observed in a situation of application of political and administrative measures to prevent genocide, such as analysis of political decisions, protection of vulnerable groups of population etc., because the concept of the crime of genocide presented in the ICJ and the ICTY practice is wide enough to assist in such prevention mechanism.

**Conclusion**

Despite the diverse legal nature and the many challenges that are faced, the ICJ and the ICTY practice together constitute a significant contribution into international legal practice of punishment and prevention of crimes of genocide. Although decisions of both institutions are not binding for each other, which leaves the ground for incoherency, the ICJ and the ICTY demonstrated achievements punishing genocide that prevail over failures. When the practice of genocide punishment stays much easier to assess in terms of successfulness because the outcome are obvious, for prevention the only conclusion could be done based on general overview.

Among the failures of the ICTY the legal failures usually are listed primary, but in the light of the announced completion strategy, organizational and technical problems are coming out as important as well. Furthermore, such problems as the length of procedure, cost of justice and impartiality are common for the Tribunal and for the ICJ. However, declared completion strategy caused, as Williams highlighted, "a significant increase in the efficiency of the tribunals"[49] that turned into numerous ICTY's achievements, mentioned above.

Yet recognizing state as such being able to commit genocide despite capacity to form genocidal intent exists only in the minds of senior officials, the ICJ is capable to attach state liability to an inquiry traditionally reserved for international criminal tribunals.

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48) Bosnia and Herzegovina v Serbia and Montenegro, para. 426.

49) Williams, S., 2011. The Completion Strategy of the ICTY and the ICTR. In: M. Bohlander, ed., International Criminal Justice: A Critical Analysis of Institutions and Procedures, 2nd ed. London: Cameron May Ltd, p.233.

The ICJ's reliance on the ICTY's work in adjudicating individual criminal responsibility is evidence of its recognition that international criminal tribunals are better suited to this task, even though some failures are unavoidable for either institution.